BLANK
PAGE

Office-Supreme Court, U.S.
FILED
NOV 17 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 677

GREAT COASTAL EXPRESS, INCORPORATED and PRICE TRANSFER COMPANY, INC., *Appellants*

v.

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, TURNER'S EXPRESS, INCORPORATED, and THE ADLEY CORPORATION, D/B/A ADLEY EXPRESS COMPANY, *Appellees*

On Appeal From the United States District Court for the Eastern District of Virginia, Richmond Division

MOTION TO AFFIRM

JAMES W. LAWSON
FRANCIS W. MCINERNY
1000 16th Street, N. W.
Washington, D. C. 20036
Attorneys for Appellees,
Turner's Express, Incorporated
The Adley Corporation, d/b/a
Adley Express Company

Of Counsel:

MACDONALD & MCINERNY

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

BLANK
PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 677

GREAT COASTAL EXPRESS, INCORPORATED and PRICE TRANSFER COMPANY, INC., *Appellants*

v.

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, TURNER'S EXPRESS, INCORPORATED, and THE ADLEY CORPORATION, D/B/A ADLEY EXPRESS COMPANY, *Appellees*

On Appeal From the United States District Court for the Eastern District of Virginia, Richmond Division

---

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, Turner's Express, Incorporated, and The Adley Corporation, d/b/a Adley Express Company, move that the judgment of the District Court be affirmed.

STATEMENT

This is a statutory appeal from the judgment of a specially constituted three-Judge District Court dismissing a complaint to set aside an order of the Interstate Commerce Commission. The Commission order denied the application of Great Coastal Express, Incorporated (Great Coastal), to purchase the operating rights of Price Transfer Company, Inc. (Price), filed and considered under Section 5(2)(a) of the Interstate Commerce Act (49 U.S.C. s. 5(2)(a)), on a finding that approval would not be consistent with the public interest.

Great Coastal sought to purchase the operating rights of Price authorizing transportation of general commodities, with exceptions, over irregular-routes between Norfolk, Va., and seven other nearby Virginia cities (J.S. 9a). Great Coastal's present rights authorize transportation of general commodities, with exceptions, over irregular-routes, between, as here material, points in James City County, Va., on the one hand and on the other, points in New Jersey within 20 miles of Newark, N. J., points in the New York, N. Y., Commercial Zone, points in Fairfield County, Conn., and points in New York, New Jersey, Pennsylvania, Delaware and Maryland north of Baltimore, Md., on specified highways between Baltimore, Md., and New York, N. Y. (J.S. 8a).

Purchase of the Price rights by Great Coastal would enable Great Coastal to institute a direct single-line service between New York City, northern New Jersey, Philadelphia and Baltimore on the one hand, and on the other, points in the Norfolk area (J.S. 40a) in direct competition with Turner's Express, Incorpo-

rated, which derives an estimated 90% of its gross revenues of $1,371,000 annually from such operations and in competition with Adley which derives nearly $800,000 annually from such operations (J.S. 22a, 23a).

The application was denied for the reasons that it would result in a new and additional competitive service (J.S. 40a), that applicants did not make a sufficient showing that benefits would accrue to the public from approval of the proposed transaction (J.S. 42a), that extension of Great Coastal's operations into the Norfolk area would disrupt the competitive balance with harmful effect on competing carriers and would not foster sound economic conditions in the industry (J.S. 43a), and that the unfavorable impact upon existing motor carriers and the public is not outweighed by any benefits which would accrue to the public (J.S. 43a).

The foregoing bases for the Examiner's recommended denial of the application were adopted by the Commission (J.S. 45a, 46a), and the Court below sustained the Commission in a per curiam decision (J.S. 1a-4a).

ARGUMENT

This appeal fails to state any substantial question warranting consideration by this Court.

1. Appellants argument that the Commission has applied a new and unlawful standard of proof in considering the nature of Price's operations earlier than six months prior to the filing of the application is without merit since the Commission's form of application, requiring the submission of evidence of operations for the six-month period preceding the filing of the application does not establish an inflexible rule con-

cerning duration of operations, but is merely a minimum prerequisite for filing and consideration of the application, and a guide to assist the applicants in meeting their burden of proof, *Dennis Trucking Co., Inc.—Control—Johnsons Transfer,* 70 M.C.C. 741 (1957), and this principle was recognized by the appellants themselves in submitting to the Commission evidence of operations for a period of nearly twenty-one months, September 5, 1961 through May 31, 1963 (J.S. 18a).

2. Appellants suggest that the Commission erred in finding that approval of the application would result in a new competitive service since it was found that a new competitive service had been established by appellants nearly eight months before the purchase contract was negotiated (J.S. 10). While appellants had it within their power to institute a new service, and thereby created evidence, and did in fact institute, in one sense, a new service eight months prior to signing the contract, approval of the application would nevertheless result in the institution of a completely new service, different from that previously conducted. Great Coastal had never been a competitive factor in the transportation of traffic between the points involved and on that dispositive issue the Examiner found (J.S. 40a):

> "Because it has not participated in traffic moving between its present authorized points and the Norfolk area, to any appreciable extent, it is held that approval of the proposed transaction would result in a new and additional competitive service (as opposed to mere substitution of service or improvement of an existing service). The result would not be distinguishable in substance from the result of an extension of Great Coastal's service

into the Norfolk area through securing new operating authority."

3. The Commission has applied the standards prescribed in the statute with reason and care. The findings of fact made in support of the Commission's ultimate conclusion are in turn fully supported by the record evidence.

CONCLUSION

This appeal involves no substantial question warranting plenary consideration by this Court. The judgment of the District Court should be affirmed.

Respectfully submitted,

JAMES W. LAWSON
FRANCIS W. MCINERNY
1000 16th Street, N. W.
Washington, D. C. 20036
Attorneys for Appellees,
Turner's Express, Incorporated
The Adley Corporation, d/b/a
Adley Express Company

Of Counsel:
MACDONALD & MCINERNY

CERTIFICATE OF SERVICE

In compliance with Rules 13(2) and 33(1), (2) and (3-b) of the Revised Rules of the Supreme Court of the United States, I, Francis W. McInerny, one of the attorneys for the appellees Turner's Express, Incorporated and The Adley Corporation, d/b/a Adley Express Company, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing document on counsel for the several parties to this proceeding, as indicated below.

This, the 17th day of November, 1965.

FRANCIS W. MCINERNY

Copies served in duly addressed envelopes with first class postage prepaid:

The Solicitor General
Department of Justice
Washington, D. C.

William H. Orrick, Jr.
Assistant Attorney General
Department of Justice
Washington, D. C.

John H. D. Wigger, Attorney
Department of Justice
Washington, D. C.

Claude V. Spratley, Jr.
United States Attorney
Richmond, Virginia

Robert W. Ginnane, General Counsel
Interstate Commerce Commission
Washington, D. C.

Clarence William Vandegrift, Attorney
Interstate Commerce Commission
Washington, D. C.

Russell Alton Wright, Esquire
Williams, Mullen & Christian
State Planters Bank Building
Richmond, Virginia

John C. Goddin, Esquire
Insurance Building
10 South Tenth Street
Richmond, Virginia

John C. Bradley, Esquire, and
Robert G. Knechtel, Esquire
618 Perpetual Building
Washington, D. C.